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No. _____

In the Supreme Court of the United States

MICHELLE SMITH

Petitioner,

v.

NORMA ALICE JONES, ACTING IN HER CAPACITY AS PRESIDENT, AND GAYNELL L. PITTMAN, ACTING IN HER CAPACITY AS TREASURER OF THE MAUK-CHARING-NORWICH COMMUNITY CLUB, AN UNINCORPORATED ASSOCIATION OF NATURAL PERSONS RESIDING IN THE STATE OF GEORGIA, COUNTY OF TAYLOR

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Pro Se Petitioner

QUESTIONS PRESENTED

1. Does a direct conflict exist between the 11th Circuit Court of Appeals' arbitrary dismissal of a case as frivolous and the U.S. Supreme Court's holding in Barefoot v. Estelle, 463 U.S. 880 (1983) when the issue before the 11th Circuit of whether section 1985 (3) of 42 U.S.C. § 1985 (3) classifies as an equal civil rights statute for the purpose of removal has not been squarely foreclosed by authoritative court decision because the issue before the 11th Circuit was one of first impression?

2. Does a direct conflict exist between the 11th Circuit Court of Appeals' holding that an arbitrary dismissal of a removed civil rights case to federal court is frivolous for lack of evidence on appeal when the District Court failed to require or allow an evidentiary hearing, in conflict with U.S. v. Rachel, 384 U.S. 780 (1966)?

3. Does a direct conflict exist between the 11th Circuit Court of Appeals and the Federal Rules of Civil Procedure when the 11th Circuit upheld the District Court's overturn of a default from a counterclaim in a removed action prior to remand?

RULE 29.6 STATEMENT AND INTERESTED PERSONS

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or non-wholly owned subsidiaries.

The following persons have an interest in the outcome of this litigation: Lovick P. Anthony, Jr., Attorney for the Mauk-Charing-Norwich Community Club; Edward Davis, Attorney for the Taylor County Board of Education; Norma Alice Jones, President, Mauk-Charing-Norwich Community Club; Judge Clay Land, District Court Judge, Middle District of Georgia; Gregory J. Leonard, District Court Clerk, Middle District of Georgia; Mauk-Charing-Norwich Community Club; W. Donald Morgan; Attorney for the Mauk-Charing Norwich Community Club; Gaynell Pittman, Treasurer, Mauk-Charing-Norwich Community Club; Michelle Smith, Petitioner; Taylor County Board of Education.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

JURISDICTION

The court of appeals' judgment was entered on July 3, 2003. A timely request for a rehearing was denied on August 6, 2003. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1985 (3); Federal Rules of Civil Procedure

STATEMENT

This case arises out of a removed case from Superior Court to District Court with removal based on civil rights. The petitioner is a new attorney who represented blacks and other poor minorities in a small, rural Georgia town. The attorney became the target of harassment that started with a rattlesnake being placed in the attorney's office, then later escalating into her historic, 100 year old family home place being destroyed by arson later attributed to a member of an all white "community club."

The club produced an apparent fraudulent deed alleging the club ownership in the office that the petitioner owned and occupied. The respondents sued the petitioner and she removed to District Court and countersued for racketeering and defamation. The club failed to respond to the complaint and in defiance of judicial process, in a Ku-Klux-Klan-like manner took over the attorney's building by force and refused her access to her building.

The petitioner obtained default against the respondents but the District Court overturned the default, denied default judgment, and remanded the case back to Taylor County Superior Court without any evidentiary hearing. The 11th Circuit Court of Appeals dismissed the case as frivolous even

though the 11th Circuit had not previously decided whether or not section 1985(3) qualifies as an equal civil rights statute for the purpose of removal.

Taylor County has a long history of racial discord, most recently highlighted with the national exposure of the dual black and white proms held each year.

This case raises important, recurring questions relating to frivolous appeals and evidentiary hearings for removed cases before remand. The 11th Circuit's decision is in direct conflict with the U.S. Supreme Court. This case while important to the parties raises issues distinguished more by the importance of the issues to the public. Many areas of the country are still plagued by racial discord and cases are removed to alleviate that bias. If the cases can be arbitrarily dismissed on appeal without proper evidentiary foundation from an evidentiary hearing, then many with these recurring racial problems are essentially without proper redress.

REASONS FOR GRANTING THE PETITION

A DIRECT CONFLICT WITH RULING IN BAREFOOT V. ESTELLE

A direct conflict exists between the 11th Circuit and Barefoot v. Estelle, 463 U.S. 880 (1983). The Supreme Court has stated that an issue is frivolous if it "squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case." Barefoot at 894.

The 11th Circuit has not specifically addressed whether 42 U.S.C. § 1985 (3) qualifies as "an equal civil rights" statute. Alabama v. Conley, 245 F.3d 1292, 1296 (11th Cir. 2001). Because the 11th Circuit had not specifically addressed whether § 1985 (3) qualifies as an equal civil rights statute, the issue in the present case was one of first impression. Since it was a case of first impression, then the 11th Circuit's ruling as frivolous was in direct conflict with the Barefoot opinion.

Courts in Conflict Regarding Definition of a Frivolous Appeal

A frivolous appeal is defined as one that pursues legal points not arguable on the merits. Ozee v. American Council on Gift Annuities, Inc. 110 F. 3d 1082, 1097 (5th Cir. 1997). Appeal based on colorable reading of case law is not frivolous. Edwards v. Cass County, 919 F.2d 273, 276 (5th Cir. 1990). Some courts admit that they cannot easily define that which is frivolous. "Frivolity, like obscenity, is often difficult to define." WSM, Inc. v. Tennessee Sales Co., 709 F.2d 1084, 1088 (6th Cir. 1983) A weak appeal is not a frivolous appeal. Hetreed v. Allstate Ins. Co. , 135 F. 3d 1155, 1158 (7th Cir. 1998).

The conflict regarding the definition of frivolous appeals is significant because it has far-reaching legal and practical effects. Many cases are without proper redress. A Court of Appeals should have the authority to clear out its docket but not at the expense of dismissing claims without first ascertaining whether or not there are arguable legal merits not clearly foreclosed by case or statute. Further, many appeals are appeals of first impression, while many appeals call for the Court of Appeals to overturn its previous holding to create new case law.

Without clear guidelines regarding how a case is deemed frivolous, the dismissal of many worthy appeals as frivolous will proceed because these appeals have no final redress.

A DIRECT CONFLICT WITH RULING IN STATE OF GEORGIA V. RACHEL

A direct conflict exists with the 11th Circuit Court of Appeals and State of Georgia v. Rachel, 384 U.S. 780, 792 (1966) because Rachel requires a hearing to establish the evidence sufficient to sustain removal. The District Court did not hold an evidentiary hearing and the 11th Circuit in direct conflict with Rachel dismissed this argument.

An oral argument was held on November 12, 2002 in District Court, but Judge Land only heard oral arguments and did not allow an evidentiary

hearing, the District Court could not properly determine whether there was sufficient evidence to sustain or deny removal. The court called the petitioner's attention to the Rules of Evidence. But per the persuasive precedent of the 7th Circuit in Borowski v. DePuy, Inc., 850 F.2d 297, 306 (7th Cir. 1988), the petitioner cannot supplement the record with documents that were not part of the district court record.

Petitioner/Defendant/Smith (Smith) asked the District Court for permission to present evidence of the Club Members committing arson to the defendant's home place at the oral argument on November 12, 2002, but Smith's request to present the evidence from the certified arson investigator was denied both as to presenting the evidence in open court or in chambers. There is no record of this conversation from the case record because no court reporter was present at the oral argument. The court did ask Smith if the incidents and the evidence she had obtained through a private arson investigator and forensic document examiner had been turned over to the appropriate authorities. Smith replied that the evidence had been turned over to the Federal Bureau of Investigations as well as the United States Attorney's Office.

Smith did not present the information of the conversation between Smith and the District Court Judge from the November 12, 2002 hearing to the 11th Circuit Court of Appeals because this information had never appeared in the record previously, and to do so would have been frivolous. The defendant at all times was deferential and conscientious in her respect to the court by not submitting information to the court that had not previously been incorporated into the District Court Record either by sworn statements of affidavits or court transcript.

Decision Not to Have an Evidentiary Hearing Incorrect

The decision to not have an evidentiary hearing is incorrect. This particular case squarely presents the inherent conflict of not having an evidentiary hearing before making a ruling regarding a remand from a civil rights removal.

This Court should clarify by a bright line ruling whether or not Rachel in fact requires an evidentiary hearing prior to a

court making a determination to remand. Without a definitive ruling, many removed cases based on civil rights will be remanded back without a hearing to properly determine whether or not the cases established an adequate evidentiary burden to stay in federal court under the civil rights statute.

The country is still polarized by racial bias and racial divide. The present case shows how polarized one community is in regards to race. Taylor County may be a novelty with its dual black and white proms, but it is hardly a novelty with racial prejudice. Racial prejudice exists throughout the country and many times the only way even handed justice comes is by a defendant removing a case to federal court pursuant to his or her civil rights.

A DIRECT CONFLICT WITH FEDERAL RULES OF CIVIL PROCEDURE

A direct conflict exists between the 11th Circuit Court of Appeals and the Federal Rules of Civil Procedure when the 11th Circuit upheld the District Court's overturn of a default from a counterclaim in a removed action prior to remand. The Federal Rules of Civil Procedure do not toll the answer of a counterclaim when filing a motion to remand. Default by reckless disregard for judicial proceedings should preclude the finding of relief from the default, and further warrants a default judgment.

In the present case, the entry of default and default judgment are warranted because the club disregarded FRCP 12 by failing to file an answer to the counterclaim, and otherwise exhibited a calculated, callous, willful, reckless, deliberate disregard for the judicial process. The 11th Circuit Court of Appeals has noted that if a party willfully defaults by displaying either an intentional or reckless disregard for the judicial proceedings, the court need make no other findings in denying relief. Compania Interamericana v. Compania Dominicana, 88 F.3d at 951-952 (11th Cir. 1996). At the time of the default, removal was proper.

A Motion to Remand Does Not Toll the Answer of a Counterclaim

The Federal Rules of Civil Procedure do not toll the answer of a counterclaim when filing a motion to remand. If a Court of Appeals can supercede the Rules of Civil Procedure, then there is no continuity and stability for all judicial proceedings. A counterclaim cannot establish jurisdiction in federal court. But until jurisdiction is found to be incorrect by the court by an order of remand, then jurisdiction is proper and an answer is required.

When an answer is not filed and default is entered, the default should stand irrespective of whether or not the case is remanded back to another jurisdiction. At the time of the default, jurisdiction is proper. To rule or hold otherwise under scores the necessity for strict rules within the judicial process.

This Court should affirmatively state that a motion for remand does not toll the Federal Rules of Civil Procedure in answering a counterclaim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

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A. (1) 11th Circuit Denial of Reconsideration.....1a

August 6, 2003

(2) 11th Circuit Dismissal of Appeal 2a

July 3, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

02-16696

NORMA ALICE JONES, acting in her capacity as President of the Mauk-Charing-Norwich Community Club, an unincorporated association of natural persons residing in the State of Georgia, County of Taylor, GAYNELL L. PITTMAN, acting in her capacity as Treasurer of the Mauk-Charing-Norwich Community Club, an unincorporated association of natural persons residing in the State of Georgia, County of Taylor,

Plaintiffs-Appellees, Counter-Defendants,
versus

BONNIE MICHELLE SMITH,

Defendant-Appellant, Counter-Claimant.

On Appeal from the United States District Court for the Middle District of Georgia

BEFORE: BIRCH, DUBINA, and WILSON, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of the Court's July 3, 2003, order dismissing this appeal as frivolous is DENIED.

Filed August 6, 2003, Thomas K. Kahn, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

02-16696

NORMA ALICE JONES, acting in her capacity as President of the Mauk-Charing-Norwich Community Club, an unincorporated association of natural persons residing in the State of Georgia, County of Taylor, GAYNELL L. PITTMAN, acting in her capacity as Treasurer of the Mauk-Charing-Norwich Community Club, an unincorporated association of natural persons residing in the State of Georgia, County of Taylor,

versus

Plaintiffs-Appellees, Counter-Defendants,

BONNIE MICHELLE SMITH,

Defendant-Appellant, Counter-Claimant.

On Appeal from the United States District Court for the Middle District of Georgia

BEFORE: DUBINA, BARKETT, and MARCUS, Circuit Judges.

BY THE COURT:

The Court has reviewed Appellant's response to the order to show cause why she should not be sanctioned pursuant to 11th Cir. R. 27-4 for filing a frivolous motion, as defined in subparagraphs (a) and (b) of Rule 27-4.. Although we refrain from imposing sanctions against Appellant, we admonish her to familiarize herself with Fed.R.Civ.P. 11 and the Federal Rules of Evidence. On its own motion, the Court DISMISSES this appeal as frivolous and entirely without merit. SEE 11th Cir. R. 42-4.

Filed July 3, 2003, Thomas K. Kahn, Clerk.